DEVELOPMENT & COMMERCIAL BANK BERHAD

v.

DATUK ONG KIAN SENG @ ONG KIN CHEANG

FEDERAL COURT, KUALA LUMPUR
DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH FCJ
TAN SRI DATO' HJ. LAMIN BIN HAJI MOHD. YUNUS PCA
DATO' PEH SWEE CHIN FCJ
[CIVIL APPEAL NO. 02-153-92]
7 JULY 1995

BANKRUPTCY: *Creditor's petition - Notice to oppose - Rules 18 & 117 of Bankruptcy Rules 1969 - Whether mandatory provisions - Non-compliance thereof - Whether fatal - Bankruptcy Rules 1969 rr. 18, 117, 274 - Bankruptcy Act 1967 s. 131.*

BANKRUPTCY: *Bankruptcy notice - Notice to challenge validity of - Delay in service of notice - Debtor serving notice to challenge validity of bankruptcy notice 7 months after being served with bankruptcy notice - Whether in contravention of s. 3(2)(ii) of Bankruptcy Act 1967 - Whether debtor disallowed from challenging validity of bankruptcy notice.*

The respondent in this appeal was indebted to the appellant bank for which a final consent judgment in respect of the debt had been obtained. The respondent had failed to fully comply with the consent order, as well as the subsequent bankruptcy notice demanding payment of the outstanding sum, and following that a creditor's petition was filed by the bank. The respondent opposed the petition and filed an affidavit deposing that the bankruptcy notice was bad in law on the ground that the interest specified therein was wrongly calculated.

In the Court below, the bank raised a preliminary objection that the affidavit was not a proper notice to oppose the petition, and that it contravened r. 117 of the Bankruptcy Rules 1969 (the Rules). According to the bank it was incumbent on the respondent, under the said rule, to have filed a notice in Form 16A, the prescribed form for the purpose. The learned Judge, overruling the objection, held that the said affidavit constituted sufficient notice of an intention to oppose the petition on the ground deposed, and that, in any event, the failure to file a notice under r. 117 was only a formal defect and therefore curable.

The learned Judge then made a finding that the demand for payment in the bankruptcy notice herein was not in accordance with the terms of the consent order as required by s. 3(1)(i) of the Bankruptcy Act, and that being the case, ruled the notice invalid on the authority of *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winstershun Insurance (M) Sdn Bhd* [1992] 2 MLJ 344. The bankruptcy notice being invalid, its non-compliance by the respondent was ruled not an act of bankruptcy, and it follows that the bank's petition, being founded on an invalid notice, must fail.

On appeal the bank argued that r. 117 is a mandatory provision and its non-compliance therefore ought to be fatal. It was further argued that the learned Judge had erred in law in treating the respondent's affidavit as a valid notice to oppose the said petition. Before the Federal Court the main issue that arose was whether on the facts the respondent's affidavit constituted a proper and valid notice to oppose the creditor's petition herein.

Held:

Per Mohamed Dzaiddin bin Haji Abdullah FCJ (delivering the judgment of the Court):

[1] Rule 117 of the Rules provides that where a debtor intends to show cause against a petition, he shall file a notice in Form 16 specifying the statements in the petition which he intends to deny or dispute. Further, r. 18 of the Rules provides that except where the Rules or the Act provide, every application shall, unless the Court otherwise directs, be made by motion supported by an affidavit. These are mandatory provisions and therefore any failure to abide by them cannot be taken as a mere irregularity that can be cured. It follows that the respondent's affidavit, being in clear contravention of the rules, is bad in law.

[2] The case of *Datuk Mohd Sari*, while distinguishable from the facts of the instant appeal, ought to be regarded as an exception to proviso (ii) of s. 3(2) of the Act. What was decided therein was that "the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s. 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967". To apply the ratio of this case in the way the learned Judge did would render nugatory s. 3(2)(ii) of the Act.

[3] The respondent's notice by way of his affidavit, having been served on the bank some seven months after the service on the respondent of the bankruptcy notice, has not complied with proviso (ii) of s. 3(2) of the Act. The respondent in any event cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies.

[Appeal allowed]

[**Bahasa Malaysia** Translation of Headnotes]

KEBANKRAPAN: *Petisyen pemiutang - Notis menentang - Kaedah 18 & 117 Kaedah-Kaedah Kebankrapan 1969 - Samada merupakan peruntukan mandatori - Ketidakpatuhan kepadanya - Samada fatal - Keadah-Kaedah Kebankrapan 1969 kk. 18, 117, 274 - Akta Kebankrapan 1967 s.131.*

KEBANKRAPAN: *Notis kebankrapan - Notis untuk mencabar keesahan - Kelewatan dalam menyampaikan notis - Penghutang menyampaikan notis untuk mencabar keesahan notis kebankrapan 7 bulan selepas diserahkan notis kebankrapan - Samada melanggar peruntukan s. 3(2)(ii) Akta Kebankrapan 1967 - Samada penghutang tidak boleh lagi mencabar keesahan notis kebankrapan.*

Responden dalam rayuan ini telah terhutang dengan bank perayu di mana satu penghakiman persetujuan yang muktamad bagi hutang tersebut telah pun diperolehi. Responden gagal untuk mematuhi sepenuhinya perintah persetujuan (consent order), dan notis kebankrapan menuntut tunggakan hutang yang menyusul selepasnya, ekoran dari mana satu petisyen pemiutang telah difailkan oleh bank**.** Responden menentang petisyen berkenaan dan memfailkan satu afidavit menyatakan bahawa notis kebankrapan di sini tidak sah di sisi undang-undang oleh kerana wang bunga yang tercatit didalam notis itu telah tidak dikira dengan betulnya.

Di Mahkamah di bawah, pihak bank telah membangkitkan bantahan awal bahawa afidavit di atas bukan merupakan notis yang teratur untuk membantah petisyen, dan bahawa ianya melanggari peruntukan k. 117 Kaedah-Kaedah Kebankrapan 1969 (Kaedah tersebut). Menurut

bank, dibawah k. 117, responden berkewajipan memfailkan suatu notis di dalam Borang 16A iaitu borang yang dikhaskan untuk tujuan berkenaan. Hakim yang bijaksana, sambil menolak bantahan, memutuskan bahawa afidavit tersebut merupakan notis yang mencukupi untuk memberitahu cadangan responden untuk membantah petisyen atas alasan yang dikemukakan di dalamnya.

Yang arif Hakim kemudiannya memutuskan bahawa tuntutan pembayaran oleh notis kebankrapan tidak selaras dengan terma consent order seperti yang dikehendakki oleh s. 3(1)(i) Akta Kebankrapan (Akta tersebut), dan oleh sebab itu, memutuskan notis berkenaan sebagai tidak sah berdasarkan autoriti *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winstershun Insurance (M) Sdn Bhd* [1992] 2 MLJ 344. Oleh kerana notis kebankrapan tidak sah, diputuskan selanjutnya bahawa ketidakpatuhan responden kepadanya tidak menjadi satu perbuatan kebankrapan, dan ianya mengikut bahawa petisyen yang dibuat oleh bank tersebut, kerana berlandaskan kepada notis yang tidak sah, semestinyalah gagal.

Semasa rayuan pihak bank menghujah bahawa k. 117 adalah satu peruntukan mandatori dan ketidakpatuhan kepadanya haruslah menjadi fatal. Dihujahkan juga bahawa Hakim yang bijaksana telah tersilap apabila mendapati afidavit responden sebagai satu notis yang sah bagi menentang petisyen pemiutang tersebut. Dihadapan Mahkamah Persekutuan isu utama yang timbul ialah samada afidavit responden berkenaan sesungguhnya merupakan satu notis yang sah dan teratur bagi menentang petisyen pemiutang di dalam kes ini.

Diputuskan:

Oleh Mohamed Dzaiddin bin Haji Abdullah HMP (menyampaikan penghakiman Mahkamah):

[1] Kaedah 117 Kaedah tersebut memperuntukkan bahawa apabila penghutang bercadang untuk menunjuk sebab terhadap sesuatu petisyen, dia hendaklah memfailkan notis di dalam Borang 16 menjelaskan pernyataan-pernyataan di dalam petisyen yang hendak disangkal atau dibantahnya. Selanjutnya, k. 18 Kaedah tersebut memperuntukkan bahawa melainkan Kaedah tersebut atau Akta ada membuat peruntukan, setiap permohonan haruslah dibuat melalui usul dan disokong oleh afidavit kecualilah Mahkamah memerintah sebaliknya. Kedua-dua kaedah ini adalah peruntukan mandatori dan oleh sebab itu, sebarang kegagalan untuk mematuhinya tidak boleh dianggap sebagai cuma perkara luar aturan yang boleh diubati. Ianya mengikut bahawa afidavit responden, kerana dengan jelasnya tidak mematuhi kaedah-kaedah berkenaan, adalah tidak sah di sisi undang-undang.

[2] Kes *Datuk Mohd Sari*, selain faktanya boleh dibezakan dari fakta kes semasa ini, harus dianggap sebagai satu kecualian kepada proviso (ii) s. 3(2) Akta. Apa yang diputuskan disitu ialah "tuntutan untuk pembayaran yang terkandung dalam notis kebankrapan tidak selari dengan terma consent order seperti yang dikehendakki oleh s. 3(1)(i) Akta Kebankrapan 1967 tetapi selari dengan terma perjanjian yang dimeterai oleh kedua-dua pihak kemudiannya, dan oleh itu ketidakpatuhan kepada notis sedemikian, berdasarkan kepada pentafsiran ketat Akta Kebankrapan 1967, tidaklah menjadi satu perbuatan kebankrapan". Menggunapakai ratio kes ini dengan cara seperti yang dibuat oleh yang arif Hakim akan hanya menjadikan s. 3(2) Akta tidak berguna lagi.

[3] Notis responden melalui afidavitnya itu, yang disampaikan kepada pihak bank lebih kurang tujuh bulan selepas beliau menerima notis kebankrapan, tidak mematuhi proviso (ii) s. 3(2) Akta. Oleh itu, responden, dalam apa halpun, tidak harus dibenarkan membantah keesahan notis kebankrapan itu atas alasan yang dipakainya.

[Rayuan dibenarkan]

Cases referred to:

Datuk Mohd. Sari bin Datuk Haji Nuar v. Norwich Winstershun Insurance (M) Sdn. Bhd. [1992] 2 MLJ 344 ***(dist)***

Datuk Lim Kheng Kim v. Malayan Banking Bhd. [1993] 2 MLJ 298 ***(foll)***

Re a Debtor, ex parte the Debtor v. Hungerford Rural District Council [1973] 1 ALL ER 797 ***(refd)***

Re Ismail bin Daud & Anor ex p Universal Life General Insurance Sdn. Bhd. [1990] 1 MLJ 118 ***(refd)***

Re Ley Boon Hee [1990] (refd)

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 MLJ 233 PC ***(refd)***

Au Yong v. Dicum & Anor. [1963] 29 MLJ 349 ***(foll)***

Ex parte Dale [1876] 3 Ch.D 322 ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, ss. (2)(ii), 3(1)(i), 6, 131

Bankruptcy Act 1914, s. 147(1) (UK)

Bankruptcy Rules 1969, rr. 18, 117, 274

Bankruptcy Rules 1870, r. 36 (UK)

Courts of Judicature Act 1964, s. 7(1)

Other source referred to:

Mallal's Digest Yearbook para. 51, p. 9

For the appellant - Siew Yew Ming; M/s. Raja Eleena Siew Ang & Tan
For the respondent - Jasvinder Kaur; M/s. K. S. Narayanan Associates

JUDGMENT

Mohamed Dzaiddin bin Haji Abdullah FCJ:

This was an appeal from the decision of the High Court Kuala Lumpur given on 6 March 1992 dismissing the creditor's petition filed against the debtor under s. 6 of the Bankruptcy Act 1967 (the Act).

Facts

Datuk Ong Kian Seng, the debtor, was indebted to the Development & Commercial Bank Berhad (the bank), the petitioning creditor, under two banking facilities granted by the bank to him for a total amount of RM441,404.96. On 7 April 1988, a final consent judgment was obtained by the bank against the debtor for the aforesaid sum together with interest. The consent order reads as follows:

> **By consent it is ordered** that the plaintiff be at liberty to enter summary judgment against the defendant in the sum of RM441,404.96 together with interest on the sum of RM294,752.87 at the rate of 18% per annum from 1 May, 1986 to date of final payment and further interest on RM146,652.09 at the rate of 18% per annum from 1 May, 1986 to date of final payment and costs of RM225 **and by consent it is ordered** that the sum of RM280,000 obtained from the purported sale of the defendant's property held under Geran Mukim No. GM 915 Lot No. 5026 Mukim of Batu to one Lim Chiew Kee and in the event the sale is not abortive the sum of RM280,000 shall be deducted from the judgment sum and that in the event the purported sale is abortive the plaintiff shall be entitled to recover the total judgment amount due hereinbefore mentioned **and by consent it is further ordered** that the defendant do pay the plaintiff the balance outstanding judgment sum together with all the accrued interest thereon by equal monthly installments of RM25,000 commencing from 1 May, 1988 until full settlement thereof **and by consent it is further ordered** that in the event the defendant default in any one of the aforesaid

instalment payment the plaintiff shall be at liberty to enforce the judgment order herein for the whole outstanding amount then due and owing **and by consent it is lastly ordered** that the defendant do pay the agreed legal fees of RM5,000.

Dated 7 April 1988.

sgd
Senior Assistant Registrar,
High Court, Kuala Lumpur

After the judgment but before the issue of the bankruptcy notice, certain payment from the proceeds of sale of the debtor's property was credited to his account leaving a balance sum of RM322,642.72. The figures showing how this balance was arrived at are set out in the following "Particulars" in the bankruptcy notice:

Particulars

Decretal Sum RM441,404.96

1. **Fixed** Loan RM146,652.09
   Add: interest from
   1/5/86 to 30/6/88 @
   18% per annum RM54,963.42
   Less: Proceeds of sale (RM201,615.51) NIL

2. **Overdraft** RM294,752.87

   Add: Interest from
   1/5/86 to 14/6/91 @ 18% per annum RM191,049.34

   Add: Costs RM5,225

   Less: Proceeds of (RM78,384.49) sale
   Payments (RM25,000)
   (RM15,000)
   (RM25,000)
   (RM25,000) RM322,642.72
   RM322,642.72
   ==========

Having failed to pay the aforesaid debt, the bank then issued a bankruptcy notice on 14 June 1991 which was served on the debtor on 8 July 1991. The notice required the debtor within 7 days after the service of the notice to pay to the bank the said sum of RM322,642.72 being the amount due on a final judgment obtained for a total amount of RM441,404.96. This was followed by the filing of the creditor's petition on 22 August 1991. On 18 February 1992, the debtor filed an affidavit opposing the petition contending that the bankruptcy notice was invalid on the ground that the interest specified in the said notice as shown in the "Particulars" was wrongly calculated.

At the hearing of the creditor's petition, Counsel for the bank raised a preliminary objection with respect to the debtor's affidavit which was used to oppose the petition. Counsel submitted that the said affidavit was not a proper notice to oppose the creditor's petition under r. 117 of the Bankruptcy Rules 1969 (the Rules). The debtor must file a notice in Form 16 with the registrar specifying the statements in the petition which he intends to deny or dispute. The learned Judge overruled the objection and held that the said affidavit was

sufficient to give notice to the bank that the debtor intended to oppose the petition on the ground that the bankruptcy notice was bad in law. He also held that the debtor's failure to file a notice under r. 117 was only a formal defect which did not cause substantial injustice to the bank. His Lordship followed *ex parte Dale* [1876] 3 Ch. D. 322 and relied on s. 131 of the Act and r. 274 of the rules.

Having disposed of the preliminary point, his Lordship then proceeded to hear the petition. From the grounds of judgment, it would seem to us that the learned Judge in dismissing the creditor's petition approached the matter upon the basis that the amount demanded in the bankruptcy notice was not in accordance with the terms of the consent order and therefore was invalid. Hence, his Lordship stated (p. 20 Appeal Record):

> The question to be considered here is whether the bankruptcy notice remained valid not only by reason that the sum specified in the notice exceeded the amount actually due but also by reason that the sum specified was not in accordance with the terms of the judgment or order.
>
> Recently, the Supreme Court in *Datuk Mohd. Sari bin Datuk Haji Nuar v. Norwich Winstershun Insurance (M) Sdn Bhd.* [1992] 2 MLJ 344, decided that the demand for payment in the bankruptcy notice issued by the respondent against the appellant was not in accordance with the terms of the consent judgment as required by s. 3(l)(i) of the Bankruptcy Act but was in accordance with the terms of an agreement subsequently entered into by the parties, and, therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act.

He continued (at p. 23):

> It is clear that the principle laid down in *Datuk Mohd. Sari's* case is that s. 3(2) proviso (ii) is limited to excess demand only and does not apply to a situation where the demand for payment in the bankruptcy notice is not in accordance with the terms of the judgment or order as required by s. 3(l)(i) of the Act. Non-compliance with such notice does not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act. Such notice cannot be regarded as a valid notice.
>
> Bearing in mind the principle laid down in *Datuk Mohd. Sari's* case, it is now necessary to examine whether the demand for payment as stated in the bankruptcy notice in the present case is in accordance with the terms of the final judgment or order.

Finally, his Lordship concluded (p. 30 Appeal Record):

> Applying the principle laid down in *Datuk Mohd Sari* case, I found that in the present case, the debtor did not raise only the question that the amount demanded in the notice was in excess of the amount actually due. The debtor indeed went further to state that the amount demanded in the notice was not calculated in accordance with the terms of the consent order.
>
> I was satisfied that, for the reasons stated above, the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent order as required by s. 3(l)(i) of the Bankruptcy Act. The bankruptcy notice was therefore invalid and non-compliance with the bankruptcy notice did not constitute an act of bankruptcy on the strict construction of the Bankruptcy Act.
>
> The creditor's petition was founded on the said bankruptcy notice and since the bankruptcy notice was not valid the creditor's petition must fail.
>
> For the reasons stated above I dismissed the creditor's petition with costs.

Before us, Encik Siew Yew Ming, for the appellant, challenged the correctness of the learned Judge's decision on four grounds, which for the purpose of this appeal, we have narrowed down to two principal grounds, *viz* that the learned Judge erred in law to treat the respondent's affidavit as a notice to oppose the creditor's petition under r. 117 of the Rules and that the learned Judge also erred in holding the amount in the bankruptcy notice was not in accordance with the terms of the consent order. With respect to the first ground, it was submitted both here and in the Court below, that the respondent must comply with rr. 117 and 18 of the rules and that the learned Judge was bound by the Supreme Court decision in *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 2 MLJ 298. On the second ground, Counsel maintained that since no notice of the excess amount was given under s. 3(2) *proviso* (ii), the amount specified in the bankruptcy notice must be accepted to be correct. In the circumstances of this case, the bankruptcy notice was in accordance with the consent order. Section 3(2) proviso (ii) provides that a bankruptcy notice shall not be invalidated by reason that the amount specified in the notice was in excess of the judgment sum unless the debtor within the time prescribed in the bankruptcy notice disputed the validity of the notice, on the ground of such mistake. Counsel relied on *Re a debtor, ex parte the Debtor v Hungerford Rural District Council* [1973] 1 All ER 797, 798; *Re Ismail bin Daud & Anor ex p Universal Life General Insurance Sdn. Bhd.* [1990] 1 MLJ 118 and *Re Ley Boon Hee* [1990] *Mallal's Digest Yearbook* para. 51 (p. 9). Counsel further submitted that the principles in *Datuk Mohd. Sari* did not apply to the present case.

Cik Kaur, for the respondent, repeated her submission made in the Court below. She maintained that the amount specified in the consent order upon which the bankruptcy notice was founded was different from the amount stated in the bankruptcy notice and therefore was not in accordance with the terms of the consent order within the provision of s. 3(l)(i) of the Act.

Thus, the first and crucial question which arises for our decision is whether the respondent can treat his affidavit affirmed on 18 February 1992 as a notice to oppose the creditor's petition. The learned Judge has ruled that he can since his failure to file a notice under r. 117 is only a formal defect which has not caused substantial injustice to the appellant. In ruling that the respondent's failure to file a notice showing cause against the petition is only a formal defect, his Lordship relied on *ex parte Dale, supra,* and the provisions of s. 131 of the Act and r. 274.

Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the rules or the Act provide, every application shall, unless the Court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim,* the Supreme Court held that failure to follow r. 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing

a notice of motion supported by an affidavit. This Court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice.

Further, we are of the view that the respondent's failure to file a notice under r. 117 supported by an affidavit cannot be excused as a mere formal defect. The learned Judge relied on *ex parte Dale*, where in that case the solicitor had inadvertently omitted to file a notice required by r. 36 of the Bankruptcy Rules 1870 (which is similar to our r. 117), but appeared at the hearing and asked for leave to be allowed to dispute the debt notwithstanding the omission to give notice. The Registrar refused the application and made an adjudication. On appeal, the adjudication was annulled. Bacon, CJ did not give any reason for the order to be discharged and the adjudication annulled. In our view, the facts therein are clearly distinguishable and cannot therefore apply to the facts in the present appeal. It would, however, be noted in *Rengasamy Pillai v. Comptroller of Income Tax, Infra*, the Privy Council found that the bankruptcy notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang DiPertuan Agong as required by s. 7(1) of the Courts of Judicature Act 1964. This was held to be a formal defect which could not reasonably mislead a debtor upon whom it was served, and was validated by s. 131 of the Act. Whereas, in our case here, r. 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. We hasten to add that no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured (*Au-Yong v. Dicum & Anor*). [1963] 29 MLJ 349, 254, CA.

We are also of the view that s. 131 of the Act and r. 274 of the Rules do not apply. Section 131, which is in the same terms as s. 147(1) of the English Bankruptcy Act 1914, states:

> 131. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

Lord Diplock, delivering the judgment of the Privy Council in *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 233 PC, drew a distinction between a defect which renders the bankruptcy proceedings a nullity and a mere formal defect or irregularity in the following words (p. 236):

> But there is relevant authority upon the construction of the identical words in s. 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a "formal defect or irregularity". It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
>
> What then is a "formal defect or irregularity" within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor ex parte the Debtor v. Bowmaker Ltd* [1951] 1 Ch. 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. **Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy**

proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a "formal defect" and validated by the section."

[Emphasis added]

As for r. 274, it deals with the effect of non-compliance with the rules. In view of what we have commented on s. 131, we are satisfied that the said rule does not help the respondent.

For reasons we have given above, in our judgment, the respondent's affidavit was of no effect, and in consequence thereof, he could not show cause against the petition and on this ground alone this appeal should be allowed.

There is yet another ground that we ought to decide on. The judgment of the learned Judge was that not only the sum specified in the bankruptcy notice had exceeded the amount actually due, it also was not in accordance with the terms of the consent judgment, reliance having been placed on the case of *Datuk Mohd. Sari, supra*. In the event, the learned Judge held, following *Datuk Mohd. Sari, supra*, that the amount specified in the bankruptcy notice was not in accordance with the terms of the consent judgment set out above. Consequently, the bankruptcy notice was invalid and non-compliance with it did not constitute an act of bankruptcy.

With respect, we are unable to agree with him. The case of *Datuk Mohd. Sari*, while distinguishable from the facts of the instant appeal, ought to be regarded as an exception to s. 3(2) proviso (ii) of the Act, because what was decided, based on its own special facts, was that "the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s. 3(1)(1) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967." (*ibid*, p. 348). To apply the ratio in *Datuk Mohd. Sari* in the way the learned Judge did, to every case where nothing else except when the sum specified in the bankruptcy notice is larger than the sum in accordance with a judgment on which the bankruptcy notice is based, would be undoubtedly to render nugatory s. 3(2) proviso (ii) of the Act. Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to s. 3(2) of the Act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein.

In the result, we allow this appeal with costs here and below. The order of the Court below is hereby set aside and receiving and adjudication order be made on the creditor's petition with effect from 6 March 1992. Deposit to be refunded to the appellant.